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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 924

WELLINGTON EQUITY FUND, INC., ET AL., PETITIONERS

v.

RALPH J. TAUSSIG, ET UX.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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v.

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OPINIONS BELOW.

The opinion of the District Court (452a-527a)[1] is reported at 187 F. Supp. 189. The opinion of the court below is printed as the Appendix to the petition, pages 19-36, and is not yet officially reported.

JURISDICTION.

The judgment[2] of the court below affirming the District Court's[3] order of June 20, 1961 was entered on January 23, 1963. The jurisdiction of this Court is invoked by petitioners under 28 U.S.C. 1254(1).

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1. References are to pages of the JOINT AND CONSOLIDATED APPENDIX (3 volumes) printed for the use of the court below. Petitioners have filed nine copies thereof under this Court's Rule 21.

2. The petition omits a copy of the judgment of the court below sought to be reviewed; it is printed as an Appendix *infra*, pages 11-12.

3. The District Court's opinion (452a-527a) is dated August 11, 1960. On June 20, 1961 the District Court granted injunctive relief

QUESTION PRESENTED.

The only question which petitioners seek to proffer (Petition, p. 2) is not involved. Petitioners seek to have this Court exercise its discretionary jurisdiction to review a question not decided by the court below.[4]

STATEMENT OF THE CASE.

This is a shareholders suit brought by two shareholders derivatively on behalf of Wellington Fund, Inc. ("Wellington Fund"), and representatively on behalf of its many shareholders. The court below held that petitioners had unlawfully appropriated the name and goodwill of Wellington Fund; it enjoined petitioners from continuation of unfair competition.

Wellington Fund is a Delaware corporation organized in 1928. Since 1940 it has been an investment company registered under the Investment Company Act. The peti-

(528a-529a). On July 12, 1961 the District Court denied an accounting (530a), and again on July 31, 1961; the District Court's order of July 31, 1961 contains a certification under Federal Rule 54(b) (531a). The three petitioners herein appealed from the District Court's order of June 20, 1961, which appeal became No. 13,702 in the court below. Wellington Fund, Inc. was caused to appeal from the same order, and this appeal became No. 13,703 in the court below. Respondents appealed from the District Court's orders of July 12, and July 31, 1961, which consolidated appeals became Nos. 13,704, and 13,705 in the court below. The court below permitted the filing of a JOINT AND CONSOLIDATED APPENDIX in Nos. 13,702 to 13,705 inclusive.

Respondents are filing a petition for writ of certiorari to review the judgment of the court below entered in Nos. 13,704 and 13,705.

4. The only possible question herein is whether the court below correctly affirmed the determination made by the District Court upon most elaborate findings of fact and conclusions of law that the investment company in question is entitled to the protection afforded by the common law of unfair competition to its corporate name used as a trade name and trade mark. In the court below petitioners did *not* seek to bring themselves within Federal Rule 52(a), and they did not attack any findings of fact or conclusions of law made by the District Court.

tioners are also Delaware corporations; one is also an investment company, incorporated August 26, 1958, and two are corporations owned by Walter L. Morgan. Wellington Equity Fund, Inc. ("Wellington Equity Fund"), petitioner herein, on October 23, 1958 changed from a closed-end to an open-end[5] investment company registered under the Investment Company Act. Petitioner The Wellington Company,—owned by Morgan—is, under contract, the investment adviser[6] and principal underwriter[7] of Wellington Fund, and the principal underwriter of Wellington Equity Fund. Petitioner Wellington Company, Ltd.—owned by Morgan[8]—is, under contract, the investment adviser of Wellington Equity Fund. As of December 31, 1958 Wellington Fund had more than 262,000 shareholders and assets of more than $857,000,000 (453a).[9] Wellington Equity Fund on October 23, 1958 received assets[10] of $33,124,000 after the public sale by a national underwriting syndicate of 3,000,000 shares of its capital stock (801a, 874a).

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5. Wellington Fund and Wellington Equity Fund are management, open-end, diversified investment companies under the Investment Company Act. Sections 4(3), 5(a)(1) and 5(b)(1).

6. Sections 2(a)(19) and 15(a) of the Investment Company Act.

7. Sections 2(a)(28) and 15(b) of the Investment Company Act.

8. In the words of the District Court: "Walter L. Morgan is undeniably the dominant figure in this narrative. He is president and director of each of the defendants. In addition, with respect to defendant [The] Wellington Company, he is the beneficial and record holder of the common stock and substantially all of the preferred stock. He is also beneficial and record holder of substantially all of the outstanding common stock of defendant Wellington [Company] Ltd. and together with members of his family owns a majority of its preferred stock" (526a).

9. Wellington Fund presently has more than 350,000 shareholders, assets of more than $1,400,000,000 and more than 100,000,000 shares outstanding.

10. Wellington Equity Fund presently has assets of about $75,000,000 with more than 5,000,000 shares outstanding, and more than 25,000 shareholders.

In the words of the District Court—"The thrust of plaintiffs' case is simply that Wellington Fund owns the name 'Wellington' and has the right to use that name to the exclusion of all others in the investment company industry" (470a-471a). Petitioners contend, on the other hand, that the Wellington name and its goodwill belong to Morgan (or to petitioner The Wellington Company, solely owned by Morgan).[11] Petitioners espoused in the courts below, and urge upon this Court, the "corporate shell" theory of the nature of Wellington Fund as an investment company. Morgan himself testified with regard to Wellington Fund that ". . . The Fund itself does not amount to anything. The Fund is a corporate shell" (336a).[12] In the courts below (as they now contend in the petition), petioners contended that the Wellington name and the goodwill inherent therein does not relate to any activity of Wellington Fund, but symbolizes rather the business of the investment adviser and principal underwriter of Wellington Fund (471a); that, in reality, Wellington Fund engages in no business activities at all; and that the directors of Wellington Fund have merely the obligations to act as directors of a "corporate shell".[13]

Since, in petitioners' view, Wellington Fund is a "corporate shell", and Wellington Fund's only activities are those of the investment adviser and principal underwriter of Wellington Fund, The Wellington Company, which is owned by Morgan, petitioners urge that only Morgan or

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11. Petitioners' Answer to the complaint asserts that, "To the extent that rights, goodwill and value exist in the name 'Wellington' as it is related to the investment advisory and mutual fund field, the same belong to and enure to the benefit of, the said W. L. Morgan or to defendant The Wellington Company" (43a, ¶ 37).

12. Petitioners argued in the District Court that Wellington Fund ". . . *engages in no activities and is a mere conduit or shell*" (473a, n. 47). (Emphasis added.)

13. Welch, Executive Vice President and director of Wellington Fund, testified that the job of managing Wellington Fund had been *"assigned"* by the board of directors of Wellington Fund to The Wellington Company (125a).

his wholly owned company ". . . have the right to determine the extent to which the name 'Wellington' and any associated names and symbols may be used in the investment advisory and mutual fund field by other persons or corporations" (44a, ¶ 44); that Morgan (or his company) have the *sole* right to endow Wellington Equity Fund with the Wellington name, and such ". . . symbols, literature, format, seals, slogans, and the like as have been used" in connection with the Wellington Fund (45a, ¶ 45). These contentions (reasserted in the present petition), as well as many other contentions (471a), were urged by petitioners upon the District Court. In elaborate findings and conclusions the District Court rejected them all (471a-512a).

The District Court held in substance: that there had been an "overwhelming" and "conclusive" showing of unfair competition and the unlawful appropriation of the Wellington name (486a); that there is ". . . simply no basis in law, or in fact . . ." for petitioners' theory attributing ownership of the name and goodwill of Wellington Fund to The Wellington Company because it happened at the relevant time to be, under contract, the investment adviser and principal underwriter of Wellington Fund (482a); and that the resolution of the Board of Directors of Wellington Fund granting to Wellington Equity Fund the right to use the name Wellington, at a time when *each* director of Wellington Equity Fund was *also* a director of Wellington Fund, at best could ". . . be deemed nothing more than the gift of a valuable corporate asset" belonging to Wellington Fund (503a). In the words of the District Court: "It is properly inferable from the record that defendants intentionally adopted the name 'Wellington Equity Fund' to capitalize on the excellent reputation Wellington Fund enjoys with the investing public" (487a).

The District Court found that, "There is no question, very real advantages accrued . . ." to Morgan and his companies by virtue of affixing the Wellington name to the new investment company (505a); that ". . . it is clear

Wellington Equity Fund intended to poach 'upon the commercial magnetism of the symbol' " (506a). The District Court asserted that it was unwilling ". . . to forsake 262,000 investors with holdings of $858 million in favor of a corporation controlled by one person, Walter L. Morgan, who is also president and director of Wellington Fund" (477a); and that it was unwilling to hold that Wellington Fund with its enormous assets ". . . is the captive of one man, Walter L. Morgan" (479a). The District Court rejected petitioner's contentions, which would, in the words of the District Court, permit them ". . . to function outside the carefully delimited boundaries of corporate law" (477a); the court stated that the "corporate shell" thesis was a mere "sophisticated nuance," and that the investing public should not have ". . . its rights determined by concepts so foreign to established principles" (499a). The District Court asserted that petitioners' very argument, in part, was an admission that ". . . the interests of Wellington Fund are secondary, and those of the closely held management and distribution companies paramount, notwithstanding, that the principals in control of these closely held companies occupy positions requiring the exercise of the highest degree of fidelity to Wellington Fund" (510a).

The District Court's order[14] dated June 20, 1961 (528a-529a) enjoins Wellington Equity Fund from using the Wellington name, and enjoins the Morgan service corporations from using the Wellington name with reference to any investment company *other than* Wellington Fund.

14. The District Court denied respondents' prayer for an accounting of the profits realized by Morgan's service companies from the unfair competition, although the District Court provided for the eventual assessment of costs and counsel fees incurred by respondents upon The Wellington Company and Wellington Company, Ltd. (521a-527a).

Respondents are filing a petition for certiorari which seeks review by this Court of the judgment of the court below which affirms the denial of an accounting in favor of Wellington Fund against the Morgan companies.

Petitioners appealed to the Court of Appeals; on January 23, 1963 it affirmed [15] the District Court's order granting injunctive relief. The Court of Appeals affirmed the judgment of the District Court; in the words of the Court of Appeals the District Court had correctly found, in substance:

> . . . (1) that in the investment company field valuable goodwill attached to and was symbolized by the name "Wellington", (2) that this goodwill was property of Wellington Fund which could not lawfully be appropriated by a new investment company calling itself Wellington Equity Fund and (3) that the consent of the directors of Wellington Fund to this appropriation was invalid. (Appendix to petition, p. 25)

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15. One judge dissented from the determination of the court below that the District Court possessed pendent jurisdiction to decide the common law claim of unfair competition. The majority of the court below held that the federal question presented—whether violations of Section 35(d) of the Investment Company Act of 1940 give rise to an implied civil action—was not "unsubstantial" under the doctrine of *Levering & Garrigues v. Morrin*, 1933, 289 U. S. 103, 105-106; and *Bell v. Hood*, 1946, 327 U. S. 678, 681-683. (Appendix to petition, p. 22.) The dissenting judge did not dissent from the views expressed by the majority of the court in affirming the findings and conclusions of the District Court on the merits of the common law unfair competition claim.

In its brief *amicus curiae* filed in the Court of Appeals, the Securities and Exchange Commission asserted, in part, that private rights of action arise by implication under Section 35(d) of the Investment Company Act; also that the facts that, (1) the Commission has not instituted a proceeding under Section 35(d) of the Act to determine whether "any word or words" in the name of an investment company are "deceptive or misleading", and (2) that the Commission has not objected to proxy material of an investment company,—are not material to a court's determination whether the adoption of a name similar to an existing investment company is actionable under common law concepts of unfair competition, and are not significant in deciding on the merits of a private right of action brought under Section 35(d) of the Investment Company Act.

ARGUMENT.

The only question which petitioners seek to proffer is not involved. When petitioners urged the District Court more than three years ago to decide the very "mutual fund industry" question which petitioners now seek to proffer to this Court, the District Court asserted:

> . . . perhaps this Court in adopting plaintiff's contentions is out of step with a "fourteen billion dollar mutual fund industry." It would, however, be unwise at this time to sit in judgment of the entire industry *and the Court will not attempt to determine any controversy except that which is now before it* (476a-477a). (Emphasis added.)

The District Court, therefore, decided only the question whether petitioners had unlawfully appropriated the name and goodwill of Wellington Fund; the District Court *expressly* did not determine any controversy relating to other investment companies; it determined only the controversy presented by respondents in their complaint relating to Wellington Fund, the corporation in which they are shareholders. The court below affirmed the District Court's determination that petitioners had unlawfully appropriated Wellington Fund's name and goodwill; the court below *necessarily* had before it the only[16] controversy which had been adjudicated by the District Court.

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16. The Investment Company Institute moved the court below for leave to file a brief *amicus curiae*, asserting in part:

> . . . The record of the case on appeal . . . reveals substantial questions of importance to the management investment company industry, involving the relationships of such companies to their shareholders, their investment advisers and their underwriters. . . . It would be the objective of the Institute, if permitted to intervene, to inform the Court of its views on those relationships, based on 20 years experience in the industry. . . .

Petitioners herein urged the court below to grant the said motion of the Investment Company Institute because: "The practice which the Court below has enjoined in this case has been followed in a number

Additionally it is argued by petitioners that "The assumptions as to the nature of the mutual fund industry and the relationship embodied in it which led to the result reached by the Third Circuit are directly contrary to those adopted by the Ninth Circuit . . ." in the case of *Securities and Exchange Commission v. Insurance Securities Incorporated etc.*, 9th Cir., 1958, 254 F. 2d 642, certiorari denied, 1958, 358 U. S. 823. But even petitioners must concede that ". . . the cases are not factually similar" (Petition, p. 6); that case involved the unrelated issue[17] of the sale of stock of an investment adviser and asserted violation of Section 36 of the Investment Company Act.

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of instances in this industry beginning as early as the late 1920's and the early 1930's." The Court of Appeals, however, by order dated October 24, 1961 *denied* the motion. On the same day the Court of Appeals also *denied* the similar motion of the Association of Mutual Fund Plan Sponsors, Inc., for leave to file a brief *amicus curiae*.

The sole question which is proffered by petitioners (Petition, p. 2) relates to an alleged ". . . industry practice of using similar names for two mutual funds . . . which utilize the services of the *same* investment adviser and distributor [principal underwriter] . . .". (Emphasis supplied.) The alleged "industry practice" referred to in the question proffered, is not, however, relevant even with regard to Wellington Fund and Wellington Equity Fund; Wellington Fund and Wellington Equity Fund have never had the *same* investment adviser.

17. The Court of Appeals for the Ninth Circuit framed the question thus, 254 F. 2d at p. 648:

> The specific question presented by appellant's argument is whether transfer of control of an investment adviser and principal underwriter at a price in excess of net asset value constitutes "gross misconduct or gross abuse of trust in respect to" an investment company which it serves, within the meaning of § 36 of the act.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1963.

APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 13,702 and 13,703.

RALPH J. TAUSSIG AND SALLY G. TAUSSIG, HIS WIFE, AS TENANTS BY THE ENTIRETIES,

v.

WELLINGTON FUND, INC.,
WELLINGTON EQUITY FUND, INC.,
THE WELLINGTON COMPANY, AND
WELLINGTON COMPANY, LTD.,
DELAWARE CORPORATIONS.

WELLINGTON EQUITY FUND, INC.,
THE WELLINGTON COMPANY,
WELLINGTON COMPANY, LTD.,
Appellants in No. 13,702.

WELLINGTON FUND, INC.,
Appellant in No. 13,703.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: KALODNER, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of June 20, 1961 of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

January 23, 1963.